OTHMAN PUTEH & ANOR

v.

KU AZMAN KU BAHARI

HIGH COURT MALAYA, ALOR SETAR
VINCENT NG J
[CIVIL APPEAL NO: 12-73-98]
18 APRIL 2002

CIVIL PROCEDURE: *Appeal - Memorandum and record of appeal - Delay in filing - Delay not reasonably explained - Extension of time - Application for extension made nine months after first hearing date - Whether smacks of indifference - Whether constituted blatant infringement of rules of court - Whether no proper appeal before the court - Whether appeal to be struck off - Subordinate Courts Rules 1980, O. 49 r. 3A(3) - Rules of the High Court 1980, O. 55 r. 2(1)*

The appellants had appealed against the decision of the Sessions Court, Alor Setar. On 16 November 1998, the Sessions Court served the appellants with the necessary Form 141 to enable the appellants to proceed with the appeal. By such service, it was incumbent on the appellants to file the appeal record within six weeks and the memorandum of appeal within two weeks, in compliance with the respective requirements of O. 49 r 3A(3) Subordinate Courts Rules 1980 and O. 55 r. 2(1) Rules of the High Court 1980. It followed thus, that the appellants had until 28 December 1998 to file the appeal record and 30 November 1998 the memorandum of appeal. The appellants, however, did not adhere to the time frame and only filed the appeal record on 9 January 1999 and the memorandum of appeal on 5 December 1998. The facts further showed that, despite the obvious transgression, the solicitors for the appellants made no attempt to apply for an extension, notwithstanding that the appeal had been fixed for hearing on two occasions, namely on 29 April 1999 and on 18 October 1999. And it was not until 13 January 2000, some nine months after the first hearing date, that the appellants filed a notice of motion for an extension of time, *albeit* for time to file only the appeal record. Before the learned judge, the respondent raised a preliminary objection that the appeal ought to be struck out as the delay in filing the two documents was inexcusable and prejudicial to the due administration of justice.

Held:

[1] In a preliminary objection on matters of form and procedure, the proper approach to take is that, such objection should not normally be held to prevail over the merits of the case unless there is blatant infringement of the rules which had occasioned prejudice to the adverse party or to the administration of justice. (p 67 e-f)

[2] The nature of the infringement and the extent of culpability of the solicitors who breached the rules would determine whether prejudice to the due administration of justice had occurred. Thus, a short period of delay in filing a document or a defect would not cause any prejudice to the due administration of justice. But if the infringement is significant and the culpability is of a high degree, the court can never condone it. (pp 67 h-i & 68 a-b)

[3] Bearing in mind that the application for extension of time to file the appeal record was only lodged on 13 January 2000, nine months after the first hearing date, there was grossly inordinate delay on the part of the appellants' solicitors. Counsel also showed indifferent conduct as, until the hearing date on 16 January 2001, there was no application for extension of time to file the memorandum of appeal, and no explanation for the delay was tendered save for a plea of miscalculation of dates. (p 68 f-h)

[4] The facts had disclosed negligence on the part of the appellants' solicitors. There were not only blatant and culpable but also varied and multiple breaches of the rules and procedures by the solicitors and for the court to overlook such breaches would be inimical to the due administration of justice. There was no proper appeal before the court and accordingly the appeal must be struck out. (p 70 b-d)

[Appeal dismissed.]

Case(s) referred to:

Arbuthnot Latham Bank Ltd v. Trafalgar Holdings Ltd & Ors, Chishty Coveney and Co v. Raja [1997] TLR 698 ***(refd)***
Lee Guat Eng v. Tan Lian Kim [1985] 2 MLJ 196 ***(dist)***
Ratnam v. Cumarasamy [1965] 1 MLJ 228 ***(refd)***
Soh Keng Hian v. American International Assurance Co Ltd [1996] 2 CLJ 449 ***(refd)***
Tan Chai Heng v. Yeo Seng Choon [1981] 1 MLJ 271 ***(refd)***
Thomas v. Booty, Edwards & Partners [1964] MLJ 359 ***(dist)***
Tong Lee Hwa & Anor v. Malayan Banking Bhd [1978] 1 MLJ 257 ***(dist)***

Legislation referred to:

Subordinate Courts Rules 1980, O. 49 r. 3A(3)

For the appellant/defendant - M/s AJ Teoh & Co
For the respondent/plaintiff - M/s NM Tiong & Co

Reported by WA Sharif

JUDGMENT

Vincent Ng J:

The appellants in this case were the defendants in the Sessions Court. Dissatisfied with the judgment awarded against them in a running down matter, they appealed. On the date of hearing of the appeal, Encik Teoh Ah Joo, the learned counsel for the appellants sought an adjournment on the grounds that the solicitor whom he had retained to do counsel work was unavailable. Encik S. Visvanathan who appeared as counsel for solicitors for the respondents requested that his preliminary objections be heard and if the court was minded to dismiss the said preliminary objections the hearing of the appeal proper could be fixed on another date. I acceded and after submissions, I upheld the preliminary objections raised and struck out the appeal resulting in this appeal against my decision.

The preliminary objections raised relates to the delay in filing both the memorandum of appeal and the record of appeal. Encik Teoh concedes that there has been a delay but disputes the period of delay, details of which I shall deal with later. He also concedes that in his application for extension of time filed on 13 January 2000 (encl. 17), he only prayed for an extension of time for the filing of the record of appeal but not for the filing of the memorandum of appeal as he miscalculated and, thus, overlooked the delay of one day. He, however, submitted that despite all these shortcomings the appellants ought to be allowed an opportunity to be heard as the appeal relates to only the quantum and it had merits. He also cited the cases of *Lee Guat Eng v. Tan Lian Kim* [1985] 2 MLJ 196, *Thomas v. Booty, Edwards & Partners* [1964] MLJ 359 and *Tong Lee Hwa & Anor v. Malayan Banking Bhd* [1978] 1 MLJ 257 in support of his application for an extension of time.

The facts and issues in some of the cited authorities differ materially from the case before me. In *Lee Guat Eng* and *Tong Lee Hwa* the notice and memorandum of appeal were filed on time but service on the respondent counsel was out of time. The Federal Court in the case of *Thomas v. Booty, Edwards & Partners* dealt with the question of a delay in the filing of the defence. There the court held that although there was a delay, the said delay was excusable in view of the fact it was occasioned by the conduct of negotiations between the parties.

The facts in the instant case shows no existence of any prior negotiations. And the delay was not restricted to only in the service of the documents on the respondent counsel but also in the filing of both the documents in the court.

The court record shows that Form 141 had been served on the appellant solicitor's firm by the Alor Setar Sessions Court on 16 November 1998. Endorsed on the said form was the following reminder which for the purpose of our appeal today is relevant:

> Nota:
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> 1. ...
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> 2. Menurut A. 49 k. 3A(3) (Kaedah-kaedah Mahkamah Rendah, 1980) tuan adalah dikehendaki dalam masa enam minggu dari tarikh penerimaan Borang 141, menyediakan dan menfailkan Rekod Rayuan di Mahkamah Tinggi.
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> 3. Menurut A. 55 k. 2(1) Kaedah-kaedah Mahkamah Tinggi 1980, tuan adalah dikehendaki dalam masa dua minggu dari tarikh penerimaan Borang 141, menfailkan Memorandum Rayuan di Mahkamah Tinggi.

A simple exercise in basic arithmetic would show that Messrs AJ Teoh & Co. had time until 28 December 1998 to file his appeal record and 30 November 1998 the memorandum of appeal, both at the High Court. This time frame was not adhered to and the appeal record was only filed on 9 January 1999 whereas the memorandum of appeal was filed on 5 December 1998.

I am conscious of the approach that I should take in a preliminary objection on matters of form or procedure. Such preliminary objections should not normally be held to prevail over the merits of the case unless there is blatant infringement of the rules and such infringement has occasioned prejudice to the adverse party or to the due administration of justice. On prejudice to the due administration of justice the view of Lord Woolf, Master of the Rolls in *Arbuthnot Latham Bank Ltd v. Trafalgar Holdings Ltd and Others, Chishty Coveney and Co v. Raja* (TLR 29 December 1997 at 698) is not only illuminating but also eminently realistic. Lord Woolf had this to say:

> ... Litigants and their legal advisers had therefore to recognise that in the future any delay which occurred would be assessed not only from the point of view of the prejudice caused to the particular litigants whose case it was, but also in relation to other litigants and the prejudice which was caused to the due administration of justice. The existing rules contained time limits which were designed to achieve the disposal of litigation within a reasonable time scale. Those rules should be observed.

The nature of the infringement and the extent of culpability of the solicitors who breached the rules would determine whether prejudice to the due administration of justice had occurred. Surely, a short period of delay in filing a document or a defect in form would not cause any prejudice to the due administration of justice and such objections would clearly be frivolous and

be deemed intended to stall the proceedings. But, if the infringement is significant and the culpability is of a high degree, the court cannot overlook such conduct without also condoning it and thereby encouraging non-observance and total disregard of clearly expressed rules in general which are meant to be observed. I find strong support for this view in *Ratnam v. Cumarasamy* [1964] 1 MLJ 228, where Lord Guest in delivering the judgment of the Privy Council, observed at p. 229:

> The Rules of court must *prima facie* be obeyed, and in order to justify a court in extending the time during which some step in procedure requires to be taken, there must be some material upon which the court can exercise its discretion. If the law were otherwise, a party in breach would have an unqualified right to an extension of time which would defeat the purpose of the rules which is to provide a timetable for the conduct of litigation.

Reverting to the present case, I had to examine the affidavits and hear submissions from both counsel to determine the nature of breach and the conduct of the firm of solicitors who managed the appellant/plaintiff's case-file. Despite the obvious transgression, the solicitors for the appellant made no attempts to apply for an extension of time and this in spite of the fact that the appeal was fixed for hearing on two occasions, that is, 29 April 1999 and 18 October 1999 and the notice of preliminary objections dated 4 October 1999 from Mr. Visvanathan's firm of solicitors. Then, sometime in January 2000 the solicitors for the appellants decided to drag themselves from slumber and filed on the 13th, a notice of motion for an extension of time. This application was, however, for time to the file the appeal record only.

It is also pertinent to note here that:

(a) as the first and the second dates fixed for hearing of the appeal were 29 April 1999 and 18 October 1999 and about nine months time was allowed to run from the first date before the application for extension of time to file the appeal record was lodged (on 13 January 2000) there was grossly inordinate delay on the part of the appellant's solicitors; and

(b) until the very date of hearing before me on 16 January 2001 there was no application for extension of time to file the memorandum of appeal, and no explanation for this delay was tendered save a plea of miscalculation of dates. For such indifferent conduct of counsel towards obligations to observe set procedure and rules the following *dicta* of the Court of Appeal in *Soh Keng Hian v. American International Assn. Co Ltd* [1996] 2 CLJ 449 is I think apposite:

> Further, there is not a word in the appellant's affidavit explaining the delay in filing its appilcation for extension of time (for service of the notice of appeal). Surely, there was nothing in the way of the appellant making such an application timeously to this court. As matters stand, the application was not filed until a month after the respondent had taken steps to have the appeal dismissed.

In his affidavit filed in support of the motion, Encik Teoh attributed the delay to the sudden resignation of his clerk and legal assistant. He explained that the said clerk had been in his employment for a considerable period of time and during the tenure of his employment he had proved his reliability and worth. As such, Encik Teoh did not find necessary to do anything more than to merely discuss and make occasional enquires. This, I take to mean that Encik Teoh found it quite unnecessary to have a 'hands on' approach where this aspect of his practice was concerned. There is a welter of authorities which held that a mistake or oversight on the part of the applicant's solicitor or on the part of the solicitor's clerk is not a sufficient ground for granting an extension of time to file a memorandum of appeal or an appeal record. And, negligence on the part of a firm of solicitors does not constitute sufficient grounds. See *Tan Chai Heng v. Yeo Seng Choon* [1981] 1 MLJ 271. In my view, on the question of negligence or oversight, any infringement of the rules or procedure should be ascribed to the firm of solicitors and not to the individual manning the firm, be it a lawyer, a clerk or an office boy, since a law firm worth its salt is presumed to be run also upon set rules of procedure and management – *a la* the courts. This must be so, as the main thrust in an action for professional negligence is essentially directed at the firm of solicitors rather than those individuals.

Encik Teoh's other contention is that if the court were to take into consideration the fact that the appeal record had been served on the respondent solicitors on 6 January 1999, there was only a delay of merely four days.

After perusing the contents of his affidavit, I find the grounds forwarded by Encik Teoh in respect of the delay to be devoid of any merits.

Neither can I accept his mode of computation of the delay. I believe the straight forward calculation which appears in the earlier part of my judgment speaks clearly for itself. As regards the alleged four days delay, I believe Encik Visvanathan's objections relates more to the delay in the filing of the documents in the court rather than service of the same between solicitors. Here I would also add that when Messrs AJ Teoh first filed the Appeal Record at the High Court only one copy of the same was filed. It was only after receiving a reminder from the senior assistant registrar of the High Court that the solicitors filed the second copy *vide* its letter of 24 February 1999. Hence,

it will be observed that proper filing of the Appeal Record was only effected by the appellant on the latter date, as O. 49 r. 3A(3) of the Rules of the Subordinate Courts 1980 requires two copies of the record to be filed.

In the premises Encik Teoh has failed to show sufficient cogent grounds for the court to exercise its discretion in his favour, more so when he had ample reminders *vide* the notices sent by the Alor Setar Sessions Court and Mr. Visvanathan's firm. In my judgment, the facts disclosed negligence on the part of the firm of solicitors retained by the appellant and did not merit the exercise of judicial discretion in favour of the appellant. I found that there were not only blatant and culpable but also varied and multiple breaches of the rules and procedures by the solicitors for the appellant/plaintiff and for this court to overlook such breaches would be inimical to the due administration of justice. There was, therefore, no proper appeal before the court and, accordingly, this appeal was struck out with costs.